IN THE

Supreme Court of the United States

OCTOBER TERM 1948

NOS. 226, 227, 243

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE COMPANY AND TRADESMAN'S NATIONAL BANK AND TRUST COMPANY,

Petitioners,

v.

CENTRAL ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE and FRANCES BOEHM,

Respondents.

MEMORANDUM OF RESPONDENTS LUCILLE WHITE AND FRANCES BOEHM IN OPPOSITION TO THE APPELLANTS' PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Opinions Below

The opinion and judgment of the court below (R. 12) and the opinion denying petitions and cross-petitions for rehearing (R. 138) are reported at 168 F. 2nd 722. The opinion of the District Court is reported at 71 F. Supp. 797 (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported but are set forth in the Commission's Holding Company Act Release Nos. 7041 (R. 25a) and 7119 (R. 128a).

Questions Presented

1. In connection with the final liquidation of a holding company compelled by the Public Utility Holding Company Act, was the District Court under Section 11(e) of the Act required to approve as "fair and equitable" mandatory payment by the common stockholders to the preferred stockholders of $3,200,000 in excess of the latter's charter and book claim on the ground that the alleged theoretical market value of the preferred stocks at the time when certain so-called "expert" testimony was given concerning such value "absent the Holding Company Act" was the correct and sole criterion for measuring the claims of such stockholders?

2. Was the District Court, in performing its affirmative and independent duty to consider and find whether a proposed plan which has been approved by the Securities and Exchange Commission is fair and equitable, required to accept as conclusive of the rights of all security holders in a final liquidation a finding by the Commission of the "value" of the preferred stocks based merely on their alleged hypothetical market value as of the time of the giving of the aforesaid testimony "apart from the impact of liquidation under Section 11", or was the District Court justified in finding on the basis of the undisputed evidence in the record before the Commission that $100 per share plus accrued dividends was the equitable equivalent of the rights surrendered by the preferred stockholders?

3. Did the Circuit Court of Appeals properly affirm the determination of the District Court in its finding that the payment of $3,200,000 to the preferred stockholders in excess of the latter's charter and book claim was not "fair and equitable"; and that the alleged "investment value" of the preferred stock "absent the Act" was not the sole test in determining the equitable equivalent of the rights surrendered by the preferred stockholders?

Statement

Prior to the adoption of the Public Utility Holding Company Act of 1935, Engineers owned and controlled approximately fifteen electric, gas and transportation companies operating throughout the United States. The Securities and Exchange Commission ordered Engineers to dispose of all its properties except the common stock of one subsidiary, Virginia Electric and Power Company.

Engineers filed a plan under Section 11(e) of the Act proposing the complete and final liquidation of Engineers and the entire holding company system. In its opinion with respect to the plan, the Commission made the following formal finding:

> "We find that the presence of Engineers would unduly complicate the structure of the system and that it would, therefore, come within the prohibition of Section 11(b)(2). Accordingly, we find that the proposal to dissolve Engineers is 'necessary' to effectuate the provisions of Section 11(b) of the Act."[1]

Notwithstanding this square finding that the liquidation was compelled by the Statute, the Commission required the plan to be amended to provide for payment to the preferred holders of the full amount to which they would have been entitled under the Charter on a *voluntary* redemption or *voluntary* liquidation.[2] The Commission rea-

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[1] R. 48a. Chairman Caffrey, in his separate concurring opinion stated: "Engineers 'voluntary' proposal did no more than forestall the necessity for action by the Commission. * * * It is the operation of Section 11 and not mere managerial discretion that has brought about the liquidation" (R. 139a, 140a).

[2] That is, $105 per share plus accrued dividends for the $5 series and $110 per share for the $5.50 and $6.00 series. These amounts aggregate $3,200,000 in excess of the $100 per share to which the preferred stockholders are entitled in liquidation (whether whole or partial) which is not "voluntary" (See Charter, R. 1412a).

soned that the Charter provisions should be disregarded, and that the preferred holders must be paid the price at which their stock would sell on the market "ex the impact of the Act", or as though the company were not required to liquidate or dissolve.

The Commission in its opinion referred to the "value" of the preferred stock computed on the foregoing basis as the "investment value" or "fair investment value",[3] terms which are quite misleading. The Commission then went on to say that this "investment value" was not challenged, and that it was in fact "conceded" by the witnesses for the company.[4] Appellants in their briefs in this Court have similarly reiterated time and again that the values accepted by the Commission were "undisputed". Such statements draw a heavy veil over large and significant portions of the evidence contained in the record. The company witnesses did indeed agree that in the boom market then current, the preferred stocks of Engineers would probably have sold close to their redemption prices if the company were not required by Section 11 to complete its liquidation and to dissolve.

Under such circumstances, these witnesses asserted, Engineers would have taken advantage of the extraordinarily low money rates to call and redeem the preferred stocks, replacing them with others carrying a much lower dividend rate with substantial resulting benefit to the common stockholders. *But the forced liquidation of Engineers rendered such action impossible.* Moreover, they testified, on the basis of intrinsic investment qualities the Engineers preferred stocks could by no means be said to have a "fair value" equal to the redemption prices because they were essentially speculative securities which would decline sharply as soon as current "boom" economic conditions

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[3] Commission Opinion, R. 67a.

[4] *Ibid.*

fell off. In substantiation of these views, the witnesses pointed to the past market history of these preferred stocks, and they discussed in considerable detail potential adverse economic factors which cast a dark cloud over the future of the stocks if they remained outstanding for any substantial length of time.[3]

No indication of this extensive testimony and evidence is even suggested by the Commission in its Opinion or by appellants in their briefs. The assumption by the Commission and the other appellants, therefore, that the "going concern" value of the preferred stock was at least equal to the redemption price of the stock is wholly unjustified.

When the plan was presented to the District Court for enforcement, the objecting common stockholders contended that on the basis of the foregoing factors, as well as on the basis of applicable legal principles, the Commission was not justified in requiring the common stockholders to pay to the preferred any amounts in excess of $100 per share plus accrued dividends. The legal questions before the District Court were threefold: (1) whether the charter liquidation provisions limiting the preferred holders to $100 per share plus dividends in the event of a liquidation "not voluntary" could be overridden; (2) whether, even if the charter liquidation provisions were not controlling, the long line of decisions consistently holding that amounts in excess of par value were not to be paid on senior securities retired under the impact of the Statute, were now to be reversed; (3) whether, in any event, the theoretical market value at which such senior securities might have sold at the time of liquidation, assuming that liquidation had not taken place, was the sole and conclusive criterion to be employed in measuring the claims of the senior security holders, with the junior equity holders simply taking whatever happened to remain.

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[3] R. 522a-525a.

The District Court concluded that even if the charter liquidation provisions were not controlling, the preferred holders were not entitled to receive amounts in excess of $100 per share plus dividends on the basis of the same legal and equitable principles which had consistently led the courts for years to deny call premiums on senior securities retired pursuant to the statutory mandate. In those cases too it had been contended by the affected security holders that if they were not entitled to "premiums" as such, they should receive amounts "measured by the premiums" to compensate them for relinquishing securities bearing a dividend or interest rate in excess of the current "going rate", but the Commission and the Courts had consistently rejected such contention on the ground that the retirement was dictated by an Act of Congress over which the company and its stockholders had no control.

The District Court found no legal support for the view that the theoretical price at which the senior securities might sell had the enterprise continued, must be accepted as the controlling criterion; and it found that adoption of such a standard would be neither realistic nor equitable in its application to the final and complete liquidation of the enterprise which was here taking place. However, the Court envisaged that there might be cases in which valid equitable considerations would justify payment to preferred stockholders of amounts in excess of the par value of their securities. The District Court, as a court of equity, therefore carefully examined the record to ascertain whether any such factors were present, and concluded:

> "No special facts or circumstances in connection with the issuance of the preferred stocks or their subsequent history, or the relationships of the preferred and common stockholders, create any equitable

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Conclusions of Law 3-8, R. 316a-317a.

considerations warranting the payment to the preferred holders of amounts in excess of $100 per share plus accrued dividends; and careful examination of all the relevant facts impels the conclusion that payment to the preferred stockholders of such excess amounts would not be warranted or justified."[1]

The Circuit Court of Appeals, after an exhaustive and thorough analysis of the Public Utility Holding Company Act and its legislative history, held that "the district court must function as an equity reorganization tribunal with the powers and functions of such a court, and not as a mere review court" (R. 30). The Court rejected the contentions of the Commission that unless the conclusions of the Commission lack rational or statutory foundation they may not be disturbed by the Section 11(e) court, or that the District Court may not reverse the Commission's decision save where the Commission has plainly abused its discretion (R. 34). The Circuit Court held that the findings and conclusions of the Commission are not binding upon the District Judge though, as was proper, he should treat them with respect. (R. 34).

The Circuit Court found that the Commission ascribed "investment value" to the preferreds but failed to make a similar approach to the common (R. 34) and that in applying the "investment value" test to the preferreds, it has misunderstood the principle of "equitable equivalents" enunciated by the Supreme Court in the *Otis & Co.* case in that investment value is and can only be one of a series of factors to be used in arriving at equitable equivalents (R. 38). The Circuit Court stated that "the new doctrine of investment value presently urged by the Com-

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[1] Conclusions of Law No. 7, R. 316a-317a. Cf. also Opinion, R. 292a.

mission may not be substituted for the doctrine of equitable equivalents enunciated in the *Otis & Co.* decision" (R. 38) and held that the District Judge did not err when he found that the plan submitted by the Commission was unfair and inequitable (R. 39).

The Circuit Court found that the District Court erred in only one particular, *viz.*, in not remanding the record to the Commission for further and appropriate action (R. 39). The Circuit Court vacated the decree and remanded the cause with the direction to enter an order disapproving the plan as not being fair and equitable within the purview of Section 11(e) of the Act and to return the record to the Commission to the end that it may take such action as the facts and the law may require (R. 40).

Reasons for Denying the Writ

The decision of the Circuit Court of Appeals in this case is not in conflict with the case of *Otis & Co. v. S. E. C.*, 323 U. S. 624, nor with the proper application of that decision to the facts in this case.[8] No practical difficulties or administrative burdens have been created by the decision of the Court below. On the record in this case, the District Court and the Circuit Court of Appeals were justified in ruling that the plan approved by the Commission was not "fair and equitable," and that portion of the Circuit Court's opinion concerning the division of functions between the Commission and District Court is supported by legislative and judicial authority and is not in conflict with other circuit courts.

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[8] Although respondents contend that the decision of the Circuit Court in this case is not in conflict with the *Otis* case, respondents have maintained and will maintain, if certiorari is granted, that the charter provisions in this case are controlling and that the overriding of these charter provisions is a violation of the Fifth Amendment.

In contending that the plan, as approved by it, is fair and equitable, the Commission asserts that it has applied the doctrine of equitable equivalents as enunciated by the Supreme Court in the *Otis* case. Having determined that the theoretical market value or "investment value" of the preferred stocks was at least equal to the call price, the Commission proceeded to the erroneous conclusion that the call price was the equitable equivalent of the rights surrendered by the preferred stockholders, and that whatever is left is the equitable equivalent of the rights surrendered by the common stockholders.

This error is apparent throughout the argument of the Commission. For example on page 16 of its petition, Counsel for the Commission said:

> "Thus, as the court below recognized, the problem was simply to determine just recompense (in cash) for the security which he (the preferred stockholder) would give up (R. 38). To the Commission, this meant giving to the preferred stockholder in cash the current value of his stock as ascertained from undisputed evidence."

A brief analysis makes the fallacy of the Commission's position most apparent. Having determined the so-called "investment value" of the preferred stock, it has loosely applied the language of this Court in the *Otis* case to argue that it has followed the reasoning of this Court. The *Otis* case, however, did not establish the principle that the "investment value" of a stock was necessarily its equitable equivalent.

In the *Otis* case, this Court at page 633 said:

> "We reach the conclusion that the Securities and Exchange Commission applied the correct rule of law

as to the rights of the stockholders inter sese. That is to say, when the Commission proceeds in the simplification of a holding company system; the rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place."

The Commission has erroneously interpreted this to mean that value on the basis of a going concern means "investment value". In the *Otis* case, the Commission estimated the future earning power of the system and apportioned such earning powers between the preferred and common stockholders based on their respective claims to income. In Engineers, the Commission has completely failed to apply the same standards and techniques employed by it, and approved by it in the *Otis* case.

This failure on the part of the Commission and the novelty of its new "investment value" technique were so apparent as to cause the Circuit Court to remark (R. 37):

> "In conclusion upon this point we state that in our opinion the Commission in attempting to apply the 'investment value' test to the Engineer"s preferreds, even to the limited extent hereinbefore indicated, has misunderstood the principle of 'equitable equivalents' enunciated by the Supreme Court in the *Otis & Co.* case."

And again (R. 38):

> "The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the *Otis & Co.* decision."

The Commission in its petition (pp. 14 and 16) has unjustifiably stated that its finding of investment value or

current market value was based upon "undisputed evidence." This finding by the Commission, however; was almost exclusively based upon the testimony of one Badger whose "study" entirely omitted any consideration of the future earning power of Engineers and its subsidiaries. Furthermore, an examination of the findings of fact by Judge Leahy[9] concerning the testimony of Badger discloses not only that the statement of "undisputed value" is without factual foundation, but also that on the factual record in this case, there is no basis for a finding that the investment value of the preferred stock exceeds $100 per share.[10]

The paramount question in both the *Otis* case and the Engineers is what is the full compensation to be paid to the preferred stockholders. It is that question which the Commission has studiously avoided by insisting that it has applied the doctrine of strict priorities. Not until this question has been determined does the question of strict, full or absolute priorities apply under the Holding Company Act. If the equitable equivalent of the rights surrendered by the preferred stockholders is at least equal to the call price, as the Commission maintains, then payment of the call price to the preferred stockholders before any payment is made to the common stockholders satisfies the doctrine of full priority. But if the equitable equivalent of the rights surrendered by the preferred stockholders does not exceed $100 per share, as found by the District Court and the Circuit Court of Appeals, then payment of $100 per share to the preferred stockholders

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[9] R. 310a-315a.

[10] R. 38. "We conceive that the Commission could make a finding under certain circumstances that investment value was the equitable equivalent to the security holder. The Commission in the instant case, however, has not made such a finding and *we do not believe that such a finding could be supported on the present record.*" (Italics supplied.)

before any payment is made to the common stockholders satisfies the doctrine of full priority."

What the Commission has done was to substitute so-called "investment value" for "equitable equivalents". Had the Commission evaluated "investment value" as merely one factor and taken into consideration *all* of the factors necessary to be weighed to arrive at "equitable equivalents" it would have come to the same inescapable conclusion arrived at by the courts below, *viz.* that the "value" of the preferred stocks did not exceed $100 per share.[12]

The Commission further argues that the decision of the Court below requires the Commission to reconstitute the entire history of the Company since 1935 and would make the task of administering the Act one of constantly increasing difficulty. This argument is a misinterpretation of the decision of the Circuit Court; for no such task has been imposed upon the Commission.

All that the District Court and the Circuit Court of Appeals intended to hold, as is apparent from a reading of their opinions, was that the substantial sacrifices which the Engineers and its common stockholders had been required to make in order to comply with the determination of the Commission to divest themselves of subsidiaries which they would otherwise have held, should have been taken into consideration in determining the fairness of giving to the preferred stockholders their call premium,

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[11] Note statement of the Commission in its brief to the Circuit Court of Appeals (p. 16):

"Having found that the preferred stocks had a value equal to their call prices, the Commission *then* applied the doctrine of full priority which this Court and the Supreme Court held applicable in the *Otis* case."

[12] See footnote 10, *supra*.

as though Engineers had voluntarily redeemed the preferred stock. As the District Court aptly said (R. 290a) "Further, it is unnecessary to decide whether these values (as testified by Badger) would more than offset the other factors previously considered and consequently justify the payment of a premium, for in this case this factor is neutralized and rendered impotent by several other considerations. What the plan overlooks is that this is not a one-way argument but a two-way argument. The necessity and impact of the plan which makes the preferreds give up this present enhanced value also works to the detriment of the common. In order to comply with the divestment orders, many of the assets of Engineers were sold for less than the carrying value on Engineers' books, and many of such securities thus disposed of subsequently increased in market value or capitalized earning power greatly in excess of the amounts realized by Engineers upon their sale." The Court of Appeals (R. 38) said, "In determining equitable equivalents the Commission must weigh all pertinent factors to the end that the security holder may receive as nearly as may be the equivalent of that which he is giving up. All pertinent factors and all substantial equities must be considered by the Commission whether equitable equivalents are to be reached by the approach ex the Act, or the approach intra the Act. The new doctrine of investment value presently urged by the Commission may not be substituted for the doctrine of equitable equivalents enunciated in the *Otis & Co.* decision."

It is quite clear from the above extracts of the opinions of the District Court and the Circuit Court of Appeals, that the only burden which the Courts below intended to impose on the Commission, was the obligation to take into consideration the substantial losses suffered by the common stock in the compliance by Engineers with the orders of the Commission. There was no intention on

the part of the Courts below to impose on the Commission the duty to reconstitute the financial history of Engineers for a period of years and to demonstrate with mathematical accuracy the exact impact upon each class of stock of the losses sustained as a result of the divestiture orders.

It is interesting to note that in no other case has the problem of evaluating the equitable rights of the preferred and common stocks of a public utility holding company created a serious problem or insuperable burden for the Commission. If any problem has been created in this case, it is due solely to the novel theory of "investment value" now introduced for the first time by the Commission. And in introducing this new theory, the Commission has run into conflict not only with its own past decisions and the decisions of the Courts,[13] but finds, for the first time in its history, that both a District Court and a Circuit Court of Appeals have refused to accept as "fair and equitable" a plan approved by the Commission.

II

The Commission concedes that a Section 11(e) district court has the affirmative and independent duty to consider and find whether a proposed plan is fair and equitable (p. 22 of its brief). It states:

> "The Commission agrees with much of what the court below states concerning the intention of the

[13] Payment of premiums to senior security holders at the expense of the junior holders held not required in reorganization under Section 11(e) of the Act in the following cases: *New York Trust Co. v. S. E. C.*, 131 F. 2d 274 (C. C. A. 2, 1942), cert. den. 318 U. S. 786, rehearing den. 319 U. S. 781; *City National Bank & Trust Co. v. S. E. C.*, 134 F. 2d 65 (C. C. A. 7, 1943); *Massachusetts Mutual Life Insurance Co. v. S. E. C.*, 151 F. 2d 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 796; *In Re Standard Gas & Electric Co.*, 151 F. 2d, 326 (C. C. A. 3, 1945).

Congress to have the Section 11(e) court function as an independent check upon the Commission's determination that a plan is fair and equitable and also that the respective roles of Commission and enforcement court should be in general similar to the relationship under Section 77 of the Bankruptcy Act between the Interstate Commerce Commission and the reorganization court. Thus, even in uncontested proceedings the Commission has consistently taken the position that the district court must be satisfied affirmatively that the plan is 'fair and equitable'."

The Commission, however, takes issue with the Circuit Court's holding that the Section 11(e) district court is not limited in its role as is a circuit court of appeals under Section 24 of the Act. The Commission states (Petition p. 21): "* * * The court below recognized that its conception of the function of the district court was in conflict with decisions of the First and Eighth Circuits in *Lahti* v. *New England Power Ass'n*, 160 F. 2d 845, 858, and *Massachusetts Mutual Life Co.* v. *S. E. C.*, 151 F. 2nd 424, 430, respectively."

In this connection, however, the Circuit Court merely said (R. 31): "That there are decided cases which *look* the other way and these are entitled to great consideration." It is perfectly apparent that neither of these cases is in actual conflict with the opinion of the Circuit Court in this case. In both the Lahti case and the Massachusetts Mutual case, *supra*, the plan had been approved by the Commission *and by the District Court*. Under these special circumstances, the review by the Circuit Court is completely different from the review by the Circuit Court in the Engineer's case where it must consider the function of the District Court *vis-a-vis* the Commission. In the Lahti and Massachusetts cases the Circuit Court was acting only as a review court and was bound by the findings of fact of both the District Court and the Commission. In

the instant case the District Court was not merely a review court but was charged by Congress, as the Commission admits, with the obligation to act "as an independent check upon the Commission's determination that a plan is fair and equitable".

It is significant that the Commission, which now urges this Court to determine the scope of the powers vested in the district court by Section 11(e) as a matter of prime importance, had practically eliminated this issue in the Circuit Court of Appeals in its petition for rehearing (p. 36) when it said:

> "We have believed and still believe that there has been no real problem in adjusting the complementary roles of the Commission and the courts so long as both apply the same consistent and determinable legal standards of fairness and equity on the same record."

The stress of appellant's arguments concerning the substantial evidence rule is based upon that portion of Section 24(a) of the Act which provides:

> "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

Appellants seek to read this portion into Section 11(e) of the Act and to have it apply to the independent examination which the district court is required by Congress to make to satisfy itself as to the fairness of a plan which the Commission itself admits Congress intended "as an independent check upon the Commission's determination that a plan is fair and equitable (Petition, p. 22). But if a district court were not permitted to inquire into the facts upon which the Commission based its determination, how could it make an "independent check" or be "satisfied affirmatively" that the plan is fair and

equitable? This the Commission does not attempt to explain.

It should be pointed out, moreover, that there is no dispute involved in this case concerning the facts. The question always has been, and still is, on the facts in the record, what are the conclusions to be drawn from those facts? It was as to those conclusions that the District Court disagreed from the Commission, as it had a right and duty to do. The District Court's decision and findings, and the affirmance thereof by the Circuit Court, in no instance contravened any finding of fact of the Commission. They merely reached different conclusions as to the equitable and legal principles applicable with respect thereto, as has been recognized by the Commission.[14]

All references by appellants to the power of the District Court to receive evidence "aliunde the record",[15] are of course dicta, since no evidence was actually received by the District Court in this case, and this point is entitled to no consideration on [illegible] petition.

Conclusion

No confusion or uncertainty exists or has been created by the decision of the Circuit Court of Appeals concerning the functions of the Commission and the District Court in the enforcement of a Section 11(e) proceeding. The Circuit Court properly rejected the "investment value"

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[14] Reply Brief of Commission in the Circuit Court of Appeals (p. 23):

"Thus, the only basis for the rejection by the District Court of the plan as approved was its disagreement with the Commission's conclusion that fairness and equity requires that the cash received by the preferred stockholders be measured by the current value of the interests surrendered. We believe that that disagreement is upon an issue of law which this Court should determine."

[15] Petition of Thomas W. Streeter, et al., p. 23.

theory of the preferred stock as the sole criterion for determining its equitable equivalent.

The petitions for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be denied.

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